No. 237.

Brf. of Mackey & Davis for Appt.

IN THE

Supreme Court of the United States.

Filed April 11, 1902.

October Term, 1901. No. 237.

LOUIS BEYER, APPELLANT,

vs.

CAROLINE LE FEVRE.

Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR THE APPELLANT.

FRANKLIN H. MACKEY,
HENRY R. DAVIS,
FOR APPELLANT.

Rewalford, Printer,
City of Washington.

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I.

STATEMENT OF THE CASE.

This is a suit in equity, begun April 7, 1899, in the Supreme Court of the District of Columbia, by the appellee against the appellant, Louis Beyer, and Louis Beyer, Jr., individually and as executor; Helen B. Johnson, and Myer Cohen and Adolph G. Wolf, trustees. His co-defendants having refused to join in the appeal to this court, the appellant was duly allowed, on summons and severance, to prosecute the appeal alone. (R., 142–3.)

The material allegations of the bill are as follow: On May 11, 1896, Mary Beyer, wife of the appellant, made a deed of trust of certain real estate in the District of Columbia to one Glover and one Parker, to secure a debt of $2,800. The debt has not been paid, and the legal title to the property is still in Glover and Parker. (R., 2, *fol.* 1–2.) The deed of trust is in the usual form, one of the trusts being, "until any sale and conveyance as hereinafter provided for to permit the said

Mary Beyer, her heirs and assigns, *to possess and enjoy* the said described premises," &c. (R., 6, *f.* 9.)

The appellant and his wife were childless, and on July 26, 1896, the wife died, leaving, according the to bill, as her only heirs-at-law and next of kin the appellee, a sister, one Elizabeth K. Maus, another sister, and Louis Beyer, Jr., a nephew. (R., 2, *f.* 2.) On July 14, 1896, twelve days before her death, the wife, Mary Beyer, executed a paper-writing in form a last will and testament, devising and bequeathing her entire estate to Louis Beyer, Jr., and Helen B. Johnson; containing a request, if not a charge, for the maintenance of a home and home comforts for the appellant, and appointing Louis Beyer, Jr., executor. (R., 2–3, 8–9.) This paper-writing was duly admitted to probate as a will of personalty, and Louis Beyer, Jr., was duly qualified as executor. Shortly thereafter the appellant filed a caveat to the paper-writing, which, however, according to the bill, he withdrew in consideration of the conveyance to him of a portion of the real estate devised, amounting in value to one-half thereof. (R., 3, *f.* 4–5.)

Mrs. Maus, the sister of the decedent and of the appellee, sold and quit-claimed her interest in the estate to Louis Beyer, Jr., and Helen B. Johnson (R., 3–4); and the appellant subsequently encumbered the real estate conveyed to him by a deed of trust to Cohen and Wolf, trustees, to secure a debt of $2,000 to one Schoenhop, who has never, at any time or in any manner, been made party to the cause. (R., 4.)

The heart of the bill of complaint is in the allegations that Mary Beyer did not possess testamentary capacity at the time of making the paper-writing in controversy, and that the same was procured to be made through the undue influence, and, in effect, fraud of Louis Beyer, Jr., and Helen B. Johnson (R., 2–3, *f.* 3–4); and in the prayer that the said paper-writing " be decreed to be not (the) last will and testament" of Mary Beyer. (R., 4, *f.* 6.)

The defendants, Louis Beyer, Jr., and Helen B. Johnson, answered the bill separately, but identically, *mutatis mutandis*,

denying all the accusatory allegations; asserting Mary Beyer's full testamentary capacity; denying that the applicant's caveat was dismissed for a consideration, the fact being that the said caveat was joined in by both of the said defendants, and was dismissed for want of prosecution; alleging that Mrs. Maus made her quit-claim to the defendant Johnson, her daughter, without consideration, for the purpose of emphasizing her conviction that Mary Beyer's will was good and valid (R., 13–17); and setting up the following objections to the bill (R., 14–15, *f.* 24–5; R., 17, *f.* 29–30):

"That on the 8th day of February, 1899, the complainant filed her caveat to said will in this court, sitting as an Orphans' Court, but she has never proceeded thereunder nor procured issues thereon, and said caveat is still pending and undetermined.

"Defendant further says that this court, sitting as an Orphans' Court, has exclusive jurisdiction to determine the validity of said will, if said complainant now has the right to litigate its validity, which defendant denies.

"He further says that if complainant has any right to attack said will she has her full and adequate remedy by an action of ejectment.

"And the defendant claims the same benefit of this objection as if raised by plea or demurrer.

"Defendant is advised and says that the complainant has not in and by her said bill made or stated any such case as entitles her to the relief sought, or to any relief in this court, sitting in equity, and he claims the same benefit of this objection as if raised by demurrer."

Cohen and Wolf answered, asserting the validity of the deed of trust to them (R., 18), and the appellant demurred generally to the bill (R., 19).

Various motions for a receiver, &c., were made in the cause from time to time, but call for no notice by this court.

While the pleadings were in the condition above shown the following stipulation was made (R., 126):

"It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the court may make

an order certifying certain issues, to be named in said order, to be tried by a jury of the Circuit Court, and that the findings by said jury upon said issues shall be returned to this court; whereupon a decree shall be entered in accordance with said findings, all rights of appeal as in cases of issues from the Orphans' Court being hereby reserved."

Upon the stipulation the court made the following order (R., 126–7):

"Ordered by the court this 25th day of June, 1899 (the parties to this cause consenting hereto), that the following issues to be tried by a jury be, and they hereby are, certified to the Circuit Court, to-wit:

"First. Was the said Mary Beyer at the time of the execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will and testament, of sound and disposing mind, memory and understanding, and capable of executing a valid deed or contract?

"Second. Was the execution of the said paper-writing bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person?

"Third. Were the contents of the paper-writing bearing date July 14th, 1896, and purporting to be the last will and testament of the said Mary Beyer, known to her at the time of the alleged execution thereof?"

Thereupon the issues were tried before a jury, the testimony and proceedings being set out in full in the record, at pages 28–113, and the verdict of the jury being set forth at page 20. The jury answered all the issues in the affirmative, "thereby," in the language of the Court of Appeals of the District of Columbia, "affirming that while the deceased was of sound and disposing mind, and knew the contents of the paper, yet the execution of the same was procured by fraud, circumvention, or undue influence." (R., 136, *f.* 134.)

A motion for a new trial, addressed to the trial judge, was overruled and the answers of the jury were certified to the court sitting in equity. (R., 129–131.)

At this stage of the cause, and not before, one Helen B. Fenton was alleged by the appellee to be a niece and heir-at-law and next of kin of Mary Beyer, and on the appellee's motion she was made a party defendant in the cause. (R., 26–7.) Her answer (R., 114, 115) is unimportant, its main feature being reliance upon the "setting aside" of the will.

The case having again come on before the Court sitting in Equity, the Court (Barnard, J.), sustained the bill and the verdict of the jury, thereby vacating the will. The Court's decree is at pages 121–2 of the record, and its opinion at pages 116–120.

From this decree the appellant and his co-defendants, Louis Beyer, Jr., and Helen B. Johnson, after due summons and severance (R., 123), appealed to the Court of Appeals of the District of Columbia, which affirmed the lower court. (Opinion, R., 133–142.)

II.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In affirming the decree of the Supreme Court of the District of Columbia.

2. In holding that the Supreme Court of the District of Columbia sitting in Equity had jurisdiction of this cause and its subject-matter.

3. In sustaining the answers of the jury to the questions submitted to it.

4. In not adjudging, ordering and decreeing that the bill of complaint should be dismissed.

III.

ARGUMENT.

The questions presented for consideration may thus be stated:

1. Had the Supreme Court of the District of Columbia, sitting as an Equity Court, jurisdiction to entertain the bill of complaint?

2. If not, did the stipulation of the parties cure the want of jurisdiction, and what is the effect of the stipulation? And,

3. If the stipulation is controlling, is the verdict of the jury on the issues sustained or justified by the evidence?

1. In order to a clear apprehension of the question of equitable jurisdiction as presented in the case, it is necessary that the exact scope of the bill of complaint should be kept constantly in mind.

In its nakedness the bill, in connection with its exhibits, alleges (*a*,) an equitable interest in the supposed testatrix in certain real estate, which equitable interest included, however, the right of possession and enjoyment until the happening of a contingency which has not yet happened; (*b*,) the execution by the supposed testatrix of a supposed will when she had not the testamentary capacity to execute such an instrument, and which instrument was procured to be executed by fraud; (*c*,) the admission of the said instrument to probate and record as a testament or will of personal estate; and (*d*,) the conveyance by the beneficiaries of the supposed will of a portion of the real estate and its subsequent encumbrance by the grantee. The prayers of the bill are (*a*,) that the supposed will be decreed not to be the will it purports to be; (*b*,) that the encumbrance by the grantee of the portion of the estate conveyed to him by the supposed beneficiaries of the supposed will be decreed to be void; (*c*,) for a receiver of all the real estate of the supposed testatrix and an accounting by the defendants of all rents, &c., received by them; and (*d*,) for general relief.

Stripped of its superfluities and reduced to its one essential, this bill is, therefore, a bald appeal to a Court of Equity to decree that a paper-writing already admitted to probate and record as a will of personalty be decreed not to be a will of realty, as having been procured by fraud and executed by a person wanting testamentary capacity.

It is difficult to see what this amounts to except a direct application to a Court of Equity to determine the validity of a will and to direct its probate or the contrary; and this upon

matters pre-eminently subjects of inquiry on trial by jury. But it is contended for the appellee, and was in effect so held by both of the lower courts, that the outstanding of the legal title to the real estate was a bar to the right of the heirs to bring ejectment, and that for this reason the heirs had the right to resort to equity. An examination of this contention, in the light of principle, will dissipate it.

A. Undoubtedly, as stated by the Court of Appeals, "before the Act of Congress of June 8, 1898, * * * the Supreme Court of this District, holding special terms for Orphans' Court business, had no power or jurisdiction to receive proof and to admit to probate a will or codicil as a devise of real estate. Campbell *vs.* Porter, 162 U. S., 478;" and the provisions of Section 8 of that act (2 Sup. R. S., 777), as to the re-offering as a will of real estate of any will filed before the passage of the act, quite as clearly refers to such re-offering of a will for probate by some person interested thereunder, and has no reference to proceedings by an heir-at-law in contest of the will. (R., 137.) Since the passage of the act, as the Court of Appeals also rightly holds, a devisee under a will probated in accordance with its provisions can claim only under such probate; for the Supreme Court of the District, sitting as an Orphans' Court, is given by the act "full and plenary jurisdiction over the subject of admitting or refusing probate of wills affecting real estate" (R., 137–8), and before any such will can be admitted to probate the heir-at-law must have notice and his due "day in court," whereby the probate of the will becomes final and conclusive, subject, of course, to all rights of appeal.

Accordingly, before the act any will of real estate had to be proved anew in every action or proceeding in which it was set up (subject, of course, to the plea of *res judicata* in a proper case), and either the heir-at-law or any one claiming under him had always the right and opportunity in such action or proceeding to contest the validity of the will. But before the present action it was never known in this jurisdiction that in

advance of the assertion of some right under a will of real estate the heir-at-law could go into equity in any suit in the nature of a suit to quiet title by annulling the will.

B. It is not supposed that even the present is such a suit, as in reality it is not; it is, as already stated, in scope and effect a suit for the naked purpose of trying in equity the validity of a will on the grounds of fraud and want of testamentary capacity; for even if it be said that the equity rules of this court dispense with the necessity of including in a bill in equity the ancient jurisdictional clause, it yet remains that the jurisdiction of equity must be gathered from the averments of the bill. It is supposed by the appellee that the bill in this case is one of the class described below, in which a court of equity is applied to in aid of a pending or contemplated ejectment. If so, the following essentials are wanting: (1,) it is not alleged that the defendants or any of them have set up, or intend to set up, the paper in question as a will of real estate; (2,) it is not alleged that the defendants, or any of them, claim any right under the paper as a will of real estate; (3,) it is not alleged that the defendants, or any of them, are in possession of the real estate or any part thereof; (4,) it is not alleged that the appellee wishes to bring or contemplates bringing an action of ejectment and finds a bar to such course in the existence of the paper, which ought to be delivered up in removal of such bar; (5,) it is not alleged that the appellee is prevented from bringing such action by reason of not having the legal title or not being entitled to possession; and (6,) especially is it not alleged that in case of an action of ejectment the defendants will or may set up the outstanding legal estate as a bar.

In all of the cases relied upon in the courts below and which are hereinafter examined, it will be found that all, or some of these essentials are present, and the general rule to be extracted from them will be found not to exceed this: That where the heir-at-law wishes to raise the question of the validity of a will of real estate and cannot bring an action of

ejectment because the legal title is outstanding he may go into equity to have the bar to his right removed by a decree restraining the claimant under the will from setting up the legal title in himself or another as a defense to an action of ejectment, and as an incident, the court of equity having acquired jurisdiction for the purpose of removing the impediment to the action may direct an issue of *devisavit vel non.*

And undoubtedly in England, as also in the common law States of this country, in the absence of statute, where a will respects real estate, jurisdiction touching it belongs to the courts of common law.

2 Story, Eq. Jur., Secs. 1445–47 and Notes.

And, as already stated, a will of real estate in the District of Columbia before the passage of the act of 1898 had to be offered and proved in every cause in which it figured. The pretense on which equity took jurisdiction over the validity of wills was that inasmuch as its jurisdiction could rightfully be invoked to enjoin the devisee from setting up an oustanding legal title as a bar to an ejectment, it could, upon the familiar principle of having obtained jurisdiction for one purpose, claim jurisdiction for all purposes. In every cause, as is emphasized by the case of Jones *vs.* Jones, 3 Mer., 167, the jurisdictional allegations must appear in the bill, or it will be demurrable. And in Pemberton *vs.* Pemberton, 13 Ves., 290, more fully considered hereinafter, the correct principle is pointed out.

Anticipating consideration of the cases relied on below, it may be here pointed out that the action of ejectment tries the right of possession only, although the rule is generally stated to be that the plaintiff must prove that he has the legal right in the premises, and the right of entry, and that the defendant is in possession. In the case at bar, according, not to the appellee's bill, but to her contention, she has not the legal estate, and for that reason cannot bring ejectment. But in the same breath, she says that the legal estate is outstanding in trustees, so that merely getting the will out of the way would not help her as to an ejectment, for, on her own contention, she must get rid of the legal estate in the trustees before she can bring her

ejectment, and the trustees are not parties to this cause, and, moreover, their legal estate is unquestioned. Is not this proceeding, therefore, purely and simply a scheme to try the validity of the will in equity, with no ulterior object in the proceeding in which the court can be asked to aid her? *A fortiori* is her case unsupportable in equity, seeing that it is not alleged that the defendants, or any of them, are in possession.

Nor is the appellee's position sustained by any of the cases relied on below. These cases will be examined in the order of their citation.

The case of Pemberton *vs.* Pemberton, 13 Ves., 290, is, as to its facts, very unsatisfactorily reported. It is said to have arisen upon a bill filed by the sisters of the testator claiming as co-heiresses at law against the devisee of an equitable estate, but under what conditions does not otherwise appear. In that case, the Chancellor, Lord Eldon, used the following language:

"The authority to declare what is and what is not a man's last will is denied to this court. This bill is rather new in principle. I have no doubt that heirs at law entitled to the estates of which their ancestors were seized, though only in equity, and *therefore* not having the means of proceeding at law, may come into equity, applying to recover the possession of those estates and to have the deeds delivered up. I will not say that in some cases they may not apply to have a will delivered up as an instrument that ought not to vex their title; which, however, if it retains in it anything that has validity ought not to be delivered up. But the course has been to file a bill stating the reasons why they cannot bring an ejectment: mortgages, outstanding terms, &c.; and in general cases this court, as it can not try the validity of a will, sends that to be determined by a proper tribunal, and afterwards does what is right. The habit in doing this has been merely to direct the heir to bring his ejectment, providing that the defendants shall not set up at law a term, satisfied or unsatisfied; and, those obstacles being removed, and a trial had in that way under the control of a court of law, they come back for the account,

the deeds, &c.; which course leaves all the encumbrances just as much encumbrances as if the possession had not been changed. There is great convenience in giving relief in that shape rather than by directing issues; for certainly the question whether a new trial should or should not be had is discussed with much more satisfaction where the trial was had than in the court out of which the issue was directed."

Pemberton *vs.* Pemberton, 13 Ves., 290, 297–8.

In McGregor *vs.* Topham, 3 Hare, 488, the bill was filed by one claiming to be customary heiress of one Richard Wrightson, and setting forth a pretense on the part of the defendants that Wrightson had left a certain will. The bill prayed a declaration that the claimant was in fact heiress as alleged, and that "if the defendants should set up any such will of Richard Wrightson, then that it might be ascertained whether any such will was or was not duly signed and published by him whilst of sound and disposing mind, memory and understanding, and that if necessary, an issue might be directed *or* that the plaintiffs might be at liberty to bring ejectment, and the defendants might be restrained from setting up the legal estate vested in the said trustees [by virtue of a settlement on the second marriage of Wrightson's widow to Topham] in bar of, or as a defense to, such issue or action."

An issue having been directed and found in favor of the will, a new trial was denied, and in the House of Lords the sole question was as to the propriety of the Chancellor's refusal of a new trial. The Lord Chancellor, Brougham, speaking of the question "whether or not an heir-at-law, before he can be disinherited by will has a right to an issue" said, "We have nothing to do with that rule. Here the question is * * * whether or not we should * * * grant a second trial."

McGregor *vs.* Topham, 3 H. L. C., 132, 153.

And the main case relied upon, Boyse *vs.* Rossborough, 6 H. L. C., 2, will be found upon examination not to have extended the rule beyond the limits above stated.

In that case, the testator, one Colclough, left a will in favor of his wife and bearing date August 6th, 1842. The wife

subsequently married one Boyse, upon whom she made a marriage settlement. Colclough's heiress, Mrs. Rossborough, with her husband, filed a bill in the Court of Chancery in Ireland against Mr. and Mrs. Boyse, alleging that the latter had by undue influence procured from Colclough a will executed August 5th, 1842, but that, finding it not sufficiently favorable to her wishes, had procured the will of August 6th to be executed, the testator being led to believe that by the second will he was only curing an alleged uncertainty in the former. In the statement of the case is the following, showing the exact character of the proceeding:

"The bill stated the settlement made on the marriage of the appellant with her second husband, and that the respondents wished to proceed by ejectment to recover the Wexford estates, but that there were outstanding terms which would be set up as a bar to any ejectment. The bill prayed that the will of the 6th of August, 1842, might be declared void, and delivered up to be cancelled, *or* that an issue might be directed to try *whether the freehold estates of Mr. Colclough were devised by the said will;* and that if it should be found that the said estates descended on his heiress at law, that the defendants might be ordered to deliver up the title deeds relating to the estates, and to account for the rents and profits of the lands received by them, or that the plaintiff might be at liberty to proceed at law by ejectment to recover the said estates, and the court might prevent any outstanding terms being set up, and for further relief."

An issue was directed without objection on the part of the respondents (page 9), which was found against the respondents, who moved for a new trial, which was refused, and a decree in conformity with the issue was thereupon passed. The following language of the Lord Chancellor is so pertinent to the case at bar that no apology need be offered for its insertion at length.

"The first point made in argument by the appellant was, that the original decree was wrong, and so that all the proceedings consequent on it must fall with it.

"The relief was asked by the bill on the ground that the plaintiffs could not proceed to establish their title by ejectment,

in consequence of the existence of outstanding terms, which would present a legal bar to such a proceeding. The appellant contended in argument that, in such a case, the only proper relief is that the defendants at law should be restrained from setting up the outstanding terms in bar of the plaintiff's title, and so that the decree actually made, directing an issue *devisavit vel non*, was erroneous, and not warranted by the principle or practice of courts of equity.

"I go along with this argument to the extent of saying, that the relief by merely restraining the defendants from availing themselves of the bar resulting from the accident of an outstanding term, is, in general, the most fit and proper relief. Such a course leaves each party at liberty to assert by legal proceedings what is in substance a mere legal right. But I cannot go the length of saying that the Court of Chancery has not the power to direct the legal question to be tried in a different form of proceeding, as, for instance, by an issue, if such a course appears more convenient. Cases may arise where effectual relief would not be given by merely restraining the parties from setting up an outstanding term. Suppose the subject matter of the devise is a mere equitable right, as, for instance, a contract to purchase, or an equity of redemption of a mortgage in fee, when the mortgagee *is in possession;* in these and similar cases it may be impossible to enable the heir to raise the question as to the validity of a will, without doing something more than merely restraining the party claiming under it from setting up an outstanding term in bar to an ejectment at the suit of the heir. It must, therefore, be a matter in the discretion of the court what course shall be taken. And that being so, it would be very inexpedient that this House should interfere with what has been done in the exercise of that discretion, unless it appears that injustice has been, or is likely to be, its consequence. I do not mean to say, that in the exercise of my discretion, if I had been the Judge originally hearing this case, I should have taken the course of directing an issue, instead of merely enabling the heir at law to proceed by ejectment. *Indeed, I doubt whether, if, at the original hearing, the point had been put to the Lord Chancellor of Ireland, as to which of these two courses he would take, he would have made a decree for an issue. I incline to think he would not.* That mode of proceeding did not originate from any suggestion of his, but was proposed at the bar, and acceded to by the Lord Chancellor. If the course taken had been one which the Court had no right to take, then it

may be said the circumstance that it did not originate with the Judge himself, but was adopted in consequence of the suggestion of counsel, could not give it validity. But where either of two courses is open to the Judge, and he in his discretion adopts that which the counsel on both sides approve, it must be a strong case indeed, which should induce your Lordships afterwards to interpose, and say that his discretion was improperly exercised, unless indeed, it appears that some gross injustice has been its result. The question, therefore, is, whether here the consequence of the course taken has been so palpably injurious to the appellant, that although it was adopted with the sanction, if not at the suggestion of her counsel, it ought to be treated by this House as erroneous and so be dealt with accordingly."

In vindicating the course taken by the Court of Chancery the Chancellor used the following language:

"Upon principle the Court must have a discretion to adopt such a course, where it seems expedient, and modern authorities fully bear me out in the view which I have thus taken. (3 Mer., 167, N.)

"In Shewen *vs.* Lewis (3 Mer., 161), reported in a note to Jones *vs.* Jones, Sir William Grant, on a bill by co-heirs impeaching a will, alleging outstanding terms, and praying either an issue or liberty to bring an ejectment, made a decree directing an issue. This was in 1815. A similar course was pursued by Sir John Leach, in Tatham *vs.* Wright (2 Russ. and M., 1); by Lord Abinger, in Middleton *vs.* Sherburne (4 Younge and C. Exch., 356), and by Sir James Wigram, in McGregor *vs.* Topham (3 Hare, 488. 3 H. L. Cas., 132.)

"The demurrer in Jones *vs.* Jones was allowed on the ground that there was no allegation of outstanding terms, nor anything stated affording a ground for equitable relief.

"The same observation applies to Armitage *vs.* Wadsworth (1 Madd., 189), before Sir Thomas Plumer. There the plaintiff, the heir, stated by his bill that his ancestor had died, seized in fee subject only to certain leases, and that since his death the defendant *had got into possession* or receipt of the rents, claiming under a pretended will, and he prayed an issue *devisavit vel non*, or liberty to proceed by ejectment, notwithstanding the lease. To this bill the defendant put in a negative plea, denying the existence of any lease. This plea was

held to be good, and of course, *therefore*, the plaintiff's right to equitable relief was gone.

"I am aware that in Jones *vs.* Jones Sir William Grant said: 'Now, although there may have been instances of issues directed on the bill of an heir-at-law where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction.' But Sir William Grant did not, as I conceive, mean to say that in granting an issue the Court would be exceeding its jurisdiction, but only that the other course was that which in general it ought, if desired by either party, to adopt.

"And I am confirmed in this by what fell from Lord Eldon in Pemberton *vs.* Pemberton (13 Ves., 290), a case in which an issue had been directed on a bill filed by an heir impeaching a will. There, on motion for a second new trial, Lord Elden said: 'In general cases this Court, as it cannot try the validity of a will, sends that to be determined by the proper tribunal, and afterwards does what is right The habit in doing this has been merely to direct the heir to bring his ejectment, providing that the defendants shall not set up at law a term satisfied or unsatisfied; and, those obstacles being removed, and a trial had in that way under the control of a court of law, they come back for the account, the deeds, et cetera, which course leaves all the encumbrances just as much encumbrances as if the possession had not been changed. There is great convenience in giving relief in that shape rather than by directing issues, for certainly the question whether a new trial should or should not be had is discussed with much more satisfaction in the court where the trial was had, than in the court out of which the issue was directed.' I cannot interpret this language as meaning anything else than this: that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, but that it is open to the court to direct an issue, if from any cause that course appears desirable."

From this it would seem clear that had the question of want of jurisdiction been made in the outset, it would have been sustained, and the Chancellor's allusion to the case of Jones *vs.* Jones, 3 Mer., 161, is with evident approval. In that case, although there was a prayer that the devisee be restrained from setting up outstanding terms, there was no allegation that there were any outstanding terms which might

be set up, and on this ground the demurrer was sustained by the Master of the Rolls, Sir William Grant. It may, therefore, confidently be repeated that the true rule is as hereinbefore stated, namely, that in order to ground the jurisdiction of equity in respect of the question of will or no will, the heir-at-law must go into court primarily, whether really or only by way of pretense, for the purpose of preventing the setting up of some existing bar to an action of ejectment, and when the court obtains jurisdiction upon such ground it may, in accordance with the familiar principle, retain jurisdiction of the cause for all purposes, and as an incident to the exercise of its jurisdiction direct an issue of *devisavit vel non;* and no case has been found in which the naked question of will or no will was proposed to a court sitting in equity.

In the case at bar, as already pointed out, there is no prayer aimed at a supposed bar to an action of ejectment and none prays an issue, and the scheme of the bill, by which the prayer for general relief is to be measured, does not even hint at either of those features. And had the bill alleged the existence of the outstanding legal estate as a bar to an action of ejectment, such allegation would be directly met by the case of George's Creek, &c., Company's lessee *vs.* Detmold, 1 Md., 225, wherein the court held that where the outstanding title is not such that the person in whom it is vested might recover against either party to the suit, it is no bar to an ejectment. In that case, there was a conveyance of the legal estate to secure bonds, among the trusts being one almost identical with that in the case at bar, namely, that until default by the company it should retain possession, and this was held to entitle the company to maintain ejectment. The opinion of the court, which cites numerous authorities, is clear and convincing, its closing paragraph being as follows: "Upon the whole, we are of opinion under such a mortgage as that in this case that the mortgagor can maintain ejectment against a stranger who rests his defense entirely on possession and an outstanding title in the mortgagee. The time is sufficiently determinable and fixed to make the duration of the demise certain, and the covenant

to hold and enjoy is sufficiently affirmative to bring it within the principle of the cases both in England and in this country."

See also to the same effect Lessee of Fowler *vs.* Whiteman, 2 Ohio State, 270; Hopkins *vs.* Ward, 6 Munf. (Va.), 38.

In closing its consideration of the case of Boyse *vs.* Rossborough, the Court of Appeals, with evident approval and as though the matter were concluded thereby, makes the following quotation from the opinion of the Lord Chancellor (R., 140–1):

"In order to come to a just conclusion on this point, let us consider what was the precise practical difference to the appellant from the adoption of the one course rather than the other. When on a bill, by an heir disputing a will, nothing is done beyond the removal of the legal impediments, then the heir brings an action of ejectment against the party in possession claiming as devisee; and assuming the heirship of the plaintiff to be, as it was in this case, admitted, the defendant begins at the trial, and adduces his evidence in support of the will. The heir then meets this case by such evidence as he can bring to impeach the will. The defendant replies, and the jurymen give their verdict. Precisely the same thing happens on an issue *devisavit vel non.* So far, therefore, as the trial is concerned, it is of no importance which course is taken. Supposing the verdict to be against the will, and there is no motion for a new trial, then, if the proceeding was by ejectment, the heir obtains possession by virtue of a writ of *habere facias possessionem.* If the course taken was to direct an issue, then the Court of Chancery causes possession to be given to the heir. In either case the devisee is compelled to *give up possession* to the heir; and whether this result follows from one species of process or another cannot be material. If the result of the trial is different, and the verdict is in favor of the devisee, then whatever course was taken for the purpose of trying the validity of the will, the bill of the heir will be dismissed, and the devisee *will retain possession.*"

The short answer to this very lucid, and from an English viewpoint, doubtless satisfactory statement, is that, if allowed force in this country, it practically nullifies those two sacred provisions of our judiciary act and Constitution to the effect that

the equitable jurisdiction of our courts shall extend to no case where there is a plain, adequate and complete remedy at law (R. S., Sec. 723), and that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. (Const. Amends., Art. VII.)

Indubitably, the hypothesis of the English cases is that the jurisdiction of chancery is, in form at least, invoked to aid in, or remove an impediment to, an action of ejectment. This is clearly recognized by the Court of Appeals of Maryland in the opinion of Alvey, C. J., in Chase *vs.* Winans, 59 Md., 480, quoted by Mr. Justice Barnard of the Supreme Court of the District of Columbia (R. 118, *f.* 226), as follows:

"There has been no exception to the exercise of jurisdiction by a court of equity in this case. But it is proper for us to say, in order that this case may not be regarded as a precedent for the exercise of jurisdiction in such cases in the future, that *it is no part of the ordinary jurisdiction of a court of equity to revise and correct the probate of wills.* In regard to wills of real estate, if formally executed according to the requirements of the statute, unless it be in the case of trusts or equitable estates, *or there be some legal impediment to the party's right to maintain an action of ejectment,* such party must assert his right in an action at law."

It is unanswerable that if, in the absence of some special ground upon which the jurisdiction of equity may be invoked, a court of equity may undertake to "revise and correct the probate of wills" or to set them aside, it may at one blow invade the jurisdiction of the common-law courts and cancel the *right* of trial by jury: for granting issues is a matter of discretion with the Chancellor, and not a right which may be insisted upon by any of the parties before him; and the test of a right is, in every case, whether it may or may not be *demanded;* if the former, the thing desired is a right, if the latter, it is not.

And, as already pointed out, the only parties in this case who, on the appellee's own contention, could bring an ejectment are the trustees holding the legal estate, and they are not parties to the cause; wherefore the only possible pretext

that could be advanced for the entertainment of this cause by a court of equity, namely, the necessity of its aid in respect of an action of ejectment, is wholly wanting. And, of course, if the appellee can not bring an ejectment, will or no will, as the fact is according to her own contention, she has no possible standing in a court of equity.

The position here taken, that equity will not entertain jurisdiction of a bill to avoid a will, seems settled by the decisions of this court in the case of *Broderick's Will* (21 Wall., 503), and Gaines *vs.* Fuentes (92 U. S., 10). These cases are copiously annotated in 8 Rose's Notes on U. S. Reports at pages 461 and 760.

It is true that in the former case the statutes of California, giving to the Probate Court the same jurisdiction as to wills of both real and personal estate, are referred to, but the reasoning of the opinion is wholly independent of those statutes, many English cases being cited and distinguished. And while in the latter case it was held that a court of equity might entertain a suit to annul a will as a muniment of title, the former case was cited with approval (p. 21), and the very important fact noted that the suit (Gaines *vs.* Fuentes) "must be treated as brought against the devisee by *strangers to the estate* to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property" (p. 17); and, moreover, the decision, as to the point under consideration, clearly rested upon the fact that by the law, "either customary or statutory," of Louisiana, where the case arose, such a suit could be brought in the courts of ordinary jurisdiction of that State (pp. 20, 21).

Among the many cases cited in Rose's Notes (*loc. cit.*) may be noticed the following:

Belton *vs.* Summer, 31 Fla., 139, 146;
Luther *vs.* Luther, 122 Ill., 558, 563–5;
Wheeler *vs.* Wheeler, 134 Ill., 522, 525–6;
Jele *vs.* Lemberger, 163 Ill., 338.

All these cases hold that, independently of statutes authorizing it, courts of equity have not, under their general chancery powers, jurisdiction to entertain a bill to set aside a will or the probate thereof, and that in every case both the extent of the jurisdiction and the manner of exercising it are measured and controlled by the terms of the statute.

The principle announced in the case of Broderick's Will has never been departed from by this court, and, on the contrary, is emphatically restated in Ellis *vs.* Davis (109 U. S., 485), which case also shows conclusively that the decision in Gaines *vs.* Fuentes rested upon the law obtaining in the State of Louisiana.

In Ellis *vs.* Davis this court said (pp. 494–5):

"It is contended, however, for the appellants that the bill ought to have been maintained, for the purpose of decreeing the invalidity of the will of Mrs. Dorsey and annulling the probate, so far, at least, as it gave effect to the will as a muniment of title.

"It is well settled that no such jurisdiction belongs to the circuit courts of the United States as courts of equity, for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question, in this aspect, was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will* (21 Wall., 503, 88 U. S., XXII, 599). It was elaborately considered and finally determined in England, by the House of Lords, in the case of Allen *vs.* McPherson (1 H. of L. Cas., 191). In that country it was undoubtedly the practice of the courts of chancery to entertain bills to perpetuate the testimony of the witnesses to a will devising lands, at the suit of the devisee against the heir-at-law, it being alleged that the latter disputed its validity; and this, as Blackstone says (3 Bl. Com., 450), "is what is usually meant by proving a will in chancery." It is also true that a bill in equity, in the nature of a bill of peace, or *quia timet*, would lie at the suit of a devisee against the heir-at-law, in which, the validity of the will having been sustained by the verdict of a jury on the trial of an issue *devisavit vel non*, a decree might be passed establishing the will and the title of the devisee under it, and perpetually enjoining the

heir-at-law from setting up any claim of title against it. (Story, Eq. Jur., Sec. 1447.) The heir-at-law, it was formerly held, was not entitled to file such a bill, for he could bring his action of ejectment, and thus had his remedy at law; although such a bill would be entertained, if not objected to, or if there were any impediments to the proper trial of the merits on such an action (Bootle *vs.* Blundell, 19 Ves., 494). The modern rule is 'that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, but that it is open to the court to direct an issue, if from any cause that course appears desirable' (Boyse *vs.* Rossborough, 6 H. of L. Cas., 1–42). The manifest ground on which courts of equity in England proceeded, in declining the jurisdiction in question, was that, as to wills of personalty, the jurisdiction of courts of probate was exclusive, and that, as to devises, the remedy at law was plain, adequate and complete. In this country, from a time anterior to the adoption of the constitution, the same distinction of jurisdiction has existed, all probate and testamentary matters having been confided either to separate courts of probate, under different denominations, or a special jurisdiction over them having been vested in courts having jurisdiction also over other subjects."

2. The question next arises, What is the effect of the stipulation in the case?

The meaning of the stipulation has been clearly misapprehended. It is to the effect that, notwithstanding the pendency of the demurrers, the court might certify issues for trial by a jury, the jury's findings to be returned to the court sitting in equity, a decree to be entered in accordance with the findings, and all rights of appeal as in cases of issues from the Orphans' Court to be reserved. (R., 126.)

Of this stipulation two things are to be observed.

A. If it meant to give the court a jurisdiction which it did not possess, it is utterly nugatory, as, upon principle and by the unanimous agreement of all the authorities, consent cannot confer jurisdiction.

B. If it meant only to try the question of fact involved and to save the questions of law for a higher court, it was an

excusable and, indeed, commendable effort to shorten the litigation by having the whole case revealed in the outset, so that but one journey might be taken to the court of last resort, which would thereby be put in position to dispose finally, once for all, of the whole case.

That this latter is the true meaning of the stipulation would seem beyond doubt. It is not agreed that the demurrers should be withdrawn or waived; it is not agreed that the decree to be made on the findings should be final; it is not in either form or effect a submission to arbitration, as was the case in Strong *vs.* Willey, 104 U. S., 512, cited by Mr. Justice Barnard (R., 120); it expressly saves the right of appeal as in cases from the Orphans' Court, all which appeals lie to the Court of Appeals and not to another judge of the Supreme Court of the District of Columbia; and in terms it is silent as to an appeal from the decree to be entered on the findings, the right to which appeal could not be waived except expressly or by unavoidable implication. Clearly it was the contemplation of this stipulation, not that the parties should stop in the court of first instance, but that they should take a verdict on the facts, subject to the ultimate judgment of the law as to the respective legal rights of the parties.

Viewed thus, the stipulation is of no importance if the judgment of this court be that the court sitting in equity had no jurisdiction to begin with. If the view of the court be the other way, the stipulation requires further brief notice.

In its most unfavorable aspect for the appellee, the stipulation merely provided for issues out of chancery, for there could be no sense in providing in one and the same breath for a decree on the findings and an appeal from the proceedings resulting in the findings. As the court will assume that the parties did not intend to do a vain thing, namely, stipulate a jurisdiction where none existed; and as, further, the opposite construction would strip the appellant of his clear legal right to an appeal, the court will, in equity and good conscience, give the stipulation the construction here contended for, especially seeing that

by so doing no legal rights of any of the parties are invaded or in any wise impaired.

If, then, the stipulation were in effect for issues out of chancery, the result on those issues is to be dealt with accordingly; and this court, as the court of ultimate appeal in the premises, has the clear right to consider those issues and the findings thereon and the testimony on which those findings were based. If this be done, the appellant has no fear of the result, as appears from the consideration of the testimony hereinafter given; and that this court may and should examine and consider the issues and findings is clear from the case of Boyse *vs.* Rossborough, so much relied on.

The learned Justice of the Supreme Court of the District of Columbia, in his opinion, after referring to the demurrers, and the contention that they had kept the point of jurisdiction continually before the court, said (R., 120):

"The agreement to send issues to the jury and the appearance of parties and trial of those issues before the jury would seem to waive the objections to that method of procedure and might estop the parties from again returning to it if the verdict was unsatisfactory to them, even if the court's jurisdiction was doubtful. I need not, however, go that far in this case, for reasons already stated, and I hold that under the facts of this case it is too late for the defendants to be allowed to say that the manner chosen of having a jury trial to determine the question of will or no will is not lawful. (Strong *vs.* Willey, 104 U. S., 512, 515.) *The court having jurisdiction for some purpose*, and the parties consenting to have the issues tried by a jury, and actually and earnestly trying the same, I think they must now be bound by such procedure."

The Court of Appeals adopted this view (R., 141), notwithstanding that it manifestly begs two questions, namely, (1) *did* the court have jurisdiction for *any* purpose? and (2) did the parties consent to have "the question of *will or no will*" determined, as Mr. Justice Barnard puts it, or the "*validity* of the will tried," as the Court of Appeals puts it? To the contrary, it is earnestly contended that the jurisdiction of the

court for any purpose in the case has not been vindicated, and the parties by their stipulation consented only to the finding by the jury of the facts presented by the issues, leaving all else to be determined in orderly judicial procedure.

And if there be any remaining doubt that this is the true construction of the stipulation, such doubt must disappear upon the briefest consideration of the further stipulation of the parties set forth on pages 27 and 28 of the record, and hereinafter printed in full. That stipulation in terms provided that all the testimony and proceedings had on the law side of the court, including the motions for a new trial made by the respective parties, might be produced, read, referred to and considered by the court as part of the record on the hearing on the equity side of the court, and also in any appellate court to which the cause might be carried by either, or any, of the parties. This is so manifestly at variance with the view that the findings of the jury were to be regarded in the light of a final arbitrament of the question of fact that it seems superfluous to add a word of argument on the subject. By this second stipulation, the whole cause—evidence, findings, motions for new trials, and all—was retransferred to the equity branch of the court for consideration by the justice there sitting, a course which would not have been assented to by the parties victorious on the law side of the court, had they for a moment supposed that such construction as they now seek to give to the original stipulation could possibly be given, namely, that its meaning was to take the jury's verdict as a finality, closing the door to any further inquiry into the facts, and closing the ears of the court to the motions for a new trial.

The case of Strong *vs.* Willey, above cited, calls for passing notice.

In that case, Willey filed a bill against Strong in 1874, which Strong answered, and in 1875 Strong filed a bill against Willey, who in turn answered. "The matters arising upon these bills of complaint were by the respective complainants referred to the arbitrament of William B. Webb under a stip-

ulation that his decision was to be final and conclusive upon all questions arising in the investigation of the cases; that the court should make a final decree based upon his report, and that no exception should be made thereto" (p. 513).

"Pursuant to this agreement, the reference was formally ordered" (page 514). A decree having been entered in accordance with the report of the arbitrator, Strong afterwards filed bills of review which were dismissed on demurrer, and he appealed.

The only questions before the court are shown in the following statement in the opinion: "It is now contended that this decree is erroneous, because (1) it does not dispose of the issues raised by the bills; and (2) it is for a sum in excess of that claimed by the appellee in his original bill" (p. 514). But notwithstanding that the effect of the arbitration was not before the court, the court used of it the following language (p. 515): "The reference of the matter in dispute to the arbitrator coupled with the agreement that his award should be made the basis of a decree in the suits is clearly a waiver of the objection that the remedy was at law and not in equity, if any such objection in fact existed, which we are by no means inclined to admit. The case is to be decided upon the face of the original record, and not upon the averment of new facts in the bills of review."

Very clearly this is not a decision to the effect that a stipulation may confer jurisdiction where none exists, and even if it were so, it would be manifestly a *dictum*, as no question was raised or presented as to the effect of the stipulation. But, however this may be, all possible applicability of what the court said on this subject to the case at bar is nullified by the simple fact, that in the case of Strong *vs.* Willey, the stipulation between the parties was the strongest conceivable, being, as above pointed out, that the arbitrator's finding should be final and conclusive, and that neither of the parties should take any exception thereto. How different this is from the stipulation in the case at bar is self-evident and calls for no further comment.

3. It remains to consider whether the verdict of the jury on the issues submitted is sustained or justified by the evidence.

A. Before, however, taking up this question on its merits, it will be well to dispose of a misconception by the Court of Appeals as to the status of the case at the final hearing before the equity court. That court in its opinion (R., 141) says: "In this case, no motion for a new trial was made to the court of equity upon the return of the verdict to that court upon the issues framed by it."

This statement raises *in limine* a question as to the character of the record which must be before the Equity Court in order to entitle a party to complain of the findings of a jury upon issues sent by the Chancellor to the law court for trial.

In Watt *vs.* Starke, 101 U. S., 247, Mr. Justice Bradley, speaking for the court, cited the case of Johnson *vs.* Harmon, 94 U. S., 371, to the effect that a bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity; or, if taken, can only be used on a motion for a new trial before the law court, and said:

"We are still of that opinion for the reasons then stated. * * * Where a Court of Chancery suspends proceedings in a cause, in order to allow the parties to bring an action at law to try the legal right, it does not assume to interfere with the course of proceedings in the court of law, and a motion for a new trial must be made to that court; but, *when it directs an issue to be tried at law*, a motion for a new trial must be made to the Court of Chancery; and, *for that purpose*, the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the use of the Chancellor. This is done either *by having the proceedings and evidence reported with the verdict*, or by moving the Chancellor to send to the judge who tried the issue for his notes of trial; or procuring a statement of same *in some other proper way*. The Chancellor then has before him *the evidence given to the jury*, and the proceedings at the trials, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become *a part of the record*, and go up to the Court of Appeal if an appeal is taken."

The record shows that the appellant entered into a stipulation which on its face shows its purpose to, "in some proper way," present to the Chancellor the whole case—proceedings, evidence, findings, etc—for his consideration on the final hearing. That stipulation is as follows:

"It is hereby stipulated by and between the parties to this cause that the stenographic report of the testimony and proceedings had on the trial of the above stated issues before Mr. Justice Cole and a jury, and reported by R. S. Boswell, as appears by his affidavit annexed to said report dated the 26th of February, 1900, may, *together with the motions for a new trial* made by the respective parties and the order of the court made in this matter, appearing in Minutes 40, page 176, of the records of the court, and also any other and all orders and proceedings passed or had herein, be produced, read, and referred to *and considered* by the court *as part of the Record* on the hearing in the Equity Court of this case and by any *appellate* court to which said cause may be carried by either or any of the parties, etc." (R., 27.)

Notwithstanding the provision that all the proceedings, "together with the motions for a new trial" might "be produced * * * and considered by the court as part of the record on the hearing in the Equity Court," etc., it seems to have been the opinion of the Court of Appeals that a *written* motion for a new trial should yet have been made and filed in the Equity Court in addition to that filed in the law court and set forth in the record at page 129.

The Equity Court (Mr. Justice Barnard) seemed, however, to consider the stipulation as sufficient to bring before him the whole case—evidence, findings, and everything else—as fully as if another and separate motion for a new trial had been filed in his court; and the appellee also must have so regarded it, for no objection or suggestion to the contrary appears in the record. Indeed, the decree (R., 121) expressly recites that—

"This cause having come on to be heard by the court, and having been argued by the solicitors for the respective parties,

and the bill, answers, demurrers, exhibits, proofs, stipulations and other proceedings having been read and considered by the court, it is therefore adjudged * * * that the verdict of the jury * * * be and the same is hereby ratified * * * as the judgment, decree and *conscience* of this court."

All this should surely be sufficient to show that the case was before the Chancellor *as on a motion for a new trial*, and was so regarded by all the parties as well as the court.

In the case in 101 U. S. (Watt *vs.* Starke, above cited), the court, in its opinion, says:

"In the case of Watkins *vs.* Carlton (10 Leigh., 560), the Court of Appeals of Virginia held, as we do, that the *whole* proceedings [which, of course, would include the motion for a new trial] in the Court of Law, upon an issue directed out of Chancery for the purpose of ascertaining a particular fact, are part and parcel of the Chancery cause; and that the court, if required, must certify any instructions given to the jury; inasmuch as the Chancellor has the right to see the whole proceedings. In that case a bill of exceptions was taken, it is true; but the case was considered *as upon a motion for a new trial*."

It is clear that the case at bar was thus considered by the Equity Court. This statement, therefore, by the Court of Appeals, that "no motion for a new trial was made to the Court of Equity," can serve no purpose unless it be to have it understood that the appellant had in some way deprived himself of the right to have the evidence, together with the findings of the jury thereon, considered and passed upon by the Equity Court, as fully as if a written motion for a new trial had been made to, and filed in, that court; a position which, in view of the authorities, and of the stipulation and the understanding and action of all the parties, as well as the Equity Court itself, is not at all tenable.

Indeed, from the view taken by this court in Johnson *vs.* Harmon, 94 U. S., 371, of the force and effect of the jury's findings, it is difficult to conceive when and under what circumstances, if ever, a formal motion for a new trial of issues

sent to a law court is necessary to be made to the Chancellor when the findings have been certified to him by the law judge. The duty of the Chancellor when the whole case, including the proceedings which have been had in the law court, is before him for final decree, is to pass such decree as the entire record, including the evidence taken upon the feigned issues, justifies. He may ignore entirely the jury's findings if, in his opinion, they are not justified by the evidence, and make a decree directly in conflict with them; or, he may, if he think proper, send the case back for a new trial in order that further evidence may be "collected," as it is expressed by Lord Eldon. Thus in the case just cited (Johnson *vs.* Harmon, *supra*), it is said:

"The issue is directed for the purpose of informing the conscience of the Chancellor and aiding him to come to a proper conclusion. If he thinks the trial has not been a fair one, or for any other reason desires a new trial, it is in his discretion to order it. But he may proceed with the case, though dissatisfied with the verdict, and make a decree contrary thereto, if, in his judgment, the law and the evidence so require. A decree in equity, therefore, when appealed from, does not stand or fall according to the legality or illegality of the proceedings on the trial of a feigned issue in the cause, for the verdict may or may not have been the ground of the decree. It is the duty of the court of first instance to decide upon the whole case—pleadings, evidence and verdict—giving to the latter so much effect as it is worth. *An appeal from the decree must be decided in the same way*, namely, upon the *whole* case."

The case, then, was before the Equity Court "as on a motion for a new trial," and was so considered by it; but whether it was or not is immaterial, so far as the hearing before the Court of Appeals was concerned. If the Equity Court failed, as it did, to appreciate its power over the findings of the jury, that is a reason why the Appellate Court should all the more have considered the case as this court has pointed out, viz: the *whole* case, and pass upon the effect of the *evidence*, not of the findings, which were simply advisory. That neither the Equity Court nor the Court of Appeals did this we shall presently

see, and this is important to be ascertained, because we have come to this court to obtain that consideration of the whole case to which we are entitled, and which it has not yet received.

B. We pass on to consider the effect given to the jury's findings by the court below.

An examination of the opinion of the chancellor who heard the case in the Equity Court easily discloses that he largely overestimated the effect of the jury's findings, and gave to them a force which they have been denied by the authorities just cited. Thus he says:

* * * "Where the parties have agreed that a decree shall be entered in accordance with the findings of the jury, it may be doubtful if the parties can be heard or be allowed to ask the Court to *disregard the verdict* unless some material error has been committed on the trial. Looking at the case from every standpoint, I have reached the conclusion that the verdict was one which the evidence warranted the jury in finding. * * * The witnesses were before them, and a motion for a new trial was argued and considered there, and the Justice presiding was satisfied that the verdict was warranted by the evidence; otherwise, he would have vacated it." (R., 120, *f.* 230.)

This language shows clearly that the learned Justice was largely influenced, if not entirely controlled, by the answers which the jury gave to the interrogatories submitted to them; in other words, he gave the answers practically the same effect, if not more, that a judge sitting in a common-law cause gives to a verdict; but we know that this is not the measure of consideration to be given by the Chancellor to the answers of a jury in a case where issues have been sent to the law court to be tried. In a common-law case, though the trial judge may differ with the jury as to what the verdict should have been, he is, nevertheless, bound to sustain it if the evidence "warranted it" in the legal sense; for the trial judge will not, merely because he cannot agree with the jury, substitute his opinion for their verdict if there be any evidence to sustain

the latter. The Chancellor, on the contrary, as we have seen, may disregard the findings when he is not satisfied with them; otherwise, the mind of the jury is substituted for the conscience of the Chancellor. Thus in Watt *vs.* Starke, *supra*, in addition to what has already been quoted from that elaborately considered case, we find the following clear and explicit enunciation of this doctrine:

"In Bootle *vs.* Blundell, 19 Ves., 500, Lord Eldon said:

"'If this court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a court of law, the opinion of a court of law is sought in such a form that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape; but, *upon an issue directed*, this court reserves to itself the review of all that passes at law; and one principle on which the motion for a new trial is made here, and not to the court of law, is that this court regards the judge's report with a view to determine whether the information *collected* before the jury, together with that which appears upon the record of the court, is sufficient to enable it to proceed satisfactorily, to which it did not consider itself competent previously. And, in another case before the same judge, Barker *vs.* Ray (2 Russ., 75), he said: In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed to satisfy the judge [Chancellor], which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed there; and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if on the trial of an issue, the judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet, if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds.

"'It is difficult to see how the matter could be made more clear than it is here put by Lord Eldon, whose familiarity with

Equity Practice and Pleading has probably never been surpassed. * * * The reason of the practice is obvious; the verdict of a jury upon an issue out of chancery is only *advisory* and never conclusive upon the court. It is intended to inform the conscience of the Chancellor. It may be disregarded and a decree rendered contrary to it. * * * But in all cases where the verdict is brought in question it is necessary that he be made acquainted with what passed at the trial, including as well the evidence given as the rulings of the court, in order that he may exercise *his own* judgment in the matter.'"

We commend the whole of this opinion, as a fully considered expression of the views of this court upon the effect of the findings of a jury upon issues sent to it out of chancery, and the duty of the Chancellor when those findings are returned to him.

The justice holding the Equity Court gave to the jury's findings a very different and a much higher value than that which this court has attributed to them. He gives counsel to understand that he doubts whether he has the power to reject these answers, and he builds his doubt upon the fact that "the issues were not sent to the law court *on his own motion*," and also because "the parties have agreed that a decree shall be entered in accordance with the findings of the jury." Yet it would seem to be plain that even if the stipulation had been intended, as clearly it was not, to overrule the law and practice and *conscience* of the court, the parties, nevertheless, did not agree that these findings should, *in any event*, become the decree of the court; that is to say, however contrary to the evidence, or inconsistent with each other, they might be, or however much the verdict may have been brought about by menacing a "hopelessly divided" jury (as we shall hereafter see) with threat of confinement to the jury room from Friday afternoon until Monday morning, if they did not agree, and by suggesting to them also the pleasant alternative that they would "be at liberty" as soon as they did agree. Nor did the parties agree that however misleading the law judge's instructions to the jury might be they were to be bound irrevocably by them. By no reasonable construction of the stip-

ulation, therefore, can it be held that the findings, however obnoxious they might be to every one of these objections, should remain unchallenged and unchallengeable and become the declared conscience of the Chancellor. We do not say that Mr. Justice Barnard held this view, but we do say that his view of the effect of the stipulation prevented him from seeing, or, perhaps it is better to say, from looking for, anything in the proceedings or in the evidence that would warrant him in refusing to accept these findings as the conscience of the Chancellor. These obnoxious features were pointed out to him, as well as to the Court of Appeals; but our efforts failed to impress either of them.

It is not a matter for surprise, therefore, that after having devoted nearly his entire opinion to considering whether the court had jurisdiction to entertain the bill, and having come to an affirmative conclusion on that point, the question—and by far the most important question to the appellant—as to the effect of the evidence to establish the findings, was not considered at all, except to say that "the witnesses were before them [the trial judge and the jury] and a motion for a new trial was argued, and considered there, *and the Justice presiding was satisfied* that the verdict was warranted by the evidence, otherwise, he would have vacated it." (R., 120, *f.* 230.) This, of course, is equivalent to saying that the conscience of the Chancellor ought to be satisfied *if* the trial judge and the jury were satisfied; but that, as we have seen, is a well-decided *non sequitur*.

The Court of Appeals fell into the same error. In its opinion, we meet with similar proof of the method adopted by it in weighing and measuring the evidence which was collected at the trial of the issues. The learned Chief Justice, delivering the opinion of the court, after devoting four and a half pages of the record to an industrious consideration of the jurisdictional question, summarily disposes of the evidence by dealing with it as if the court were sitting in a common-law case. He says:

"The justice before whom the issues were tried at law, as well as the justice in the Court of Equity, were entirely satisfied with the verdict. The trial in all respects seemed to have been fairly conducted. The jury were fully and fairly instructed by the court at the instance of the respective parties, and all the prayers offered by each side were granted, read and fully explained to the jury. We can perceive no substantial ground upon which the verdict should be set aside and a new trial upon the issues granted." (R., 141.)

This shows that what was in the mind of the Court of Appeals was, not whether the decree rendered by the Equity Court was sustained by the evidence, but whether the issues were "fully and fairly" tried by the law judge, and, having found (erroneously, as we insist) that they were so tried, it deemed that the court's plain and only duty was to affirm the decree of the Equity Court.

It is respectfully but earnestly submitted that the Court of Appeals misconceived its duty in this respect. The real, indeed the only, issue on this point raised by our appeal was: Does the evidence support the findings that "fraud, circumvention or undue influence" had brought about the making of Mary Beyer's will? Of course, if, in the opinion of the court, the evidence hangs evenly in the balance, so as to make the question of undue influence a doubtful one, the fact that the case was not fully and fairly tried might be a factor in influencing the court to direct a new trial; but if, in its opinion, the whole evidence fails to establish that the will was secured by improper influences, then it will be immaterial what were the rulings of the trial judge. This, we submit, is the true doctrine, as explained by Lord Eldon and clearly set forth by this court in Watt *vs.* Starke and Johnson *vs.* Harmon. As was said in the last-named case:

"A decree in equity when appealed from does not stand or fall, according to the legality or illegality of the proceedings on the trial of feigned issues in the cause."

And, as the court proceeds to explain, the granting of a new trial is entirely discretionary with the Chancellor. His

refusal to grant it, no matter how erroneous the rulings of the law judge, is utterly immaterial to the appellate court if, on the whole case, including the evidence, the Chancellor has made such a decree as the appellate court thinks should have been made.

"It is the duty of the court of first instance [i. e. the Equity Court] to decide upon the whole case, pleadings, evidence and verdict, giving to the latter so much effect *as it is worth.* An appeal from the decree *must be decided in the same way.*" Johnson *vs.* Harmon, *supra.*

Again, the Court of Appeals says:

"As there was no other evidence in the case than that upon which the jury acted and based their verdict, if the court below was satisfied, as it appears to have been, that the verdict was the fair result and conclusion from the evidence, the Court was certainly justified in accepting and adopting the verdict and making it the basis of the decree." (R., 114.)

Thus the Court of Appeals rests its decision, not upon the result of the evidence, but upon the fact that the Equity Court would not have made the decree it did if it had not been satisfied "that the verdict was the clear result and conclusion from the evidence;" and the Equity Court in turn made the decree it did because the law judge "was satisfied that the verdict was warranted by the evidence." Now, since the law judge was satisfied with the evidence because the jury were satisfied with it, it follows that, instead of the decree of the Court of Appeals being based upon *its own* examination of the evidence and proceedings in the case, it rests it upon the fact that the jury found as they did, and that, *therefore*, the findings ought not to be disturbed—and the jury, as we shall see, found as they did (if they were not coerced into an agreement), because the law judge permitted them to accept as the basis of their findings the incoherent and unsupported testimony of an ignorant servant girl as to isolated facts of doubtful relevancy. With the highest respect for the Court of Ap-

peals we submit that this is a complete begging of the question all around the circle of Chancellor, judge and jury.

From what has been said we think we are now justified in asserting that the error in the decree at bar is to be traced to the fact that both the Equity Court and the Court of Appeals seemed to regard the jury as the final arbiter of the facts, and that the court's duty was fully performed when it found the facts to "*fairly* support the verdict," the word "fairly" being used in the sense in which it would be used by a common-law judge. There are a number of like expressions to be found in the opinion of the Court of Appeals pregnant with the suggestion that it deemed its functions limited by the findings of the jury, and that it was the duty of the Chancellor to be "satisfied," as a law judge would be satisfied, when he finds any evidence, however slight, to support the verdict. Thus we find the expression: "The evidence taken at the trial of the issues would seem to have been *eminently proper for the consideration of the jury*" (R., 141); that is the language of a judge, not of a Chancellor, whose duty it is to examine the whole evidence himself to see whether it is satisfactory to *his* conscience without regard to what the jury may have thought about it. (See record, page 141, for other expressions of like import.)

What end is to be gained by an appeal if the appellate court bases its affirmance on the fact that the court below was satisfied with the decree appealed from? That is the reason an appeal is taken. If the court below had not been satisfied with its decree it would have vacated it itself.

We come, then, to this court, sitting *pro hac vice* as a Court of Chancery, and ask it to examine this case upon the principles heretofore laid down by it in like cases, and not to rest its decision upon the ground that two lower courts have decided the case upon its merits, and, therefore, this court will not disturb it. Our case has not only *never* been decided, but has never even been *considered*, upon its merits. But, even if it had been, the court will find in the decision of the court below that clear erroneousness which led it in Baker *vs.* Cum-

mings (169 U. S., 189–198), to reverse the decree notwithstanding that two lower courts had found for the plaintiff. Moreover, this court, if not forbidden by its own declarations in cases of this sort to substitute for its conscience the conscience of the two courts below, may not do so in the case at bar, for the reason that neither of the courts below has, as we have seen, applied its conscience to the evidence in this case. This court must, therefore, examine the whole case for itself before it can say that the decree below was justified by the weight of the evidence. When such an examination shall have been made we feel confident that it will never be declared as the conscience of this court that the will of Mary Beyer was procured "by fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person."

C. Deeming that the court will follow the rule it has heretofore so explicitly announced, by examining the evidence for the purpose of satisfying its own conscience as to what the decree should be, we now proceed to render it what assistance we may by a consideration of the merits of the case.

(1) General Statement of the Facts.

Mary Beyer, the testatrix, at the time of her death was sixty-five years of age, and the wife of the appellant, Louis Beyer, Sr. They had been married many years but had no children. The title to the only real estate they possessed stood in the wife's name. It consisted of a lot of ground improved by the house in which they resided, and six other houses erected on the rear end of the lot. The whole was worth about $20,000 or $25,000. The record shows that up to within a short time of her death she, as well as her husband, believed that in that event he would inherit it. Mrs. Helen Johnson, a niece, and Louis Smith, a nephew (known as Louis Beyer, Jr., and so called in the record), were the children of a sister of Mary Beyer. This sister died when the children were very

young and Mrs. Beyer and her husband had practically adopted them, the boy taking Mr. Beyer's name. Learning some few months before her death that her property would descend to neither her husband nor her adopted children, she determined to make a will; and desiring that the property should remain to her husband and them, she decided to leave it to young Beyer, knowing, as she told him, that he would comply with her wishes in regard to her husband and his sister Helen. Sometime afterwards, having taken to her bed with what proved to be her last illness, she directed Louis Beyer, Jr., to send for a lawyer to draw up her will. He first suggested a Mr. Nauck, but Mrs. Beyer for some reason objected to him, and then a Mr. Brennan's name was suggested and she assented. Mr. Brennan was a lawyer and member of the bar, but did not practice in the courts, giving his time to the affairs of the Cranford Paving Company of this city, of which company he was vice-president. Brennan's office was in the same building in which young Beyer was employed. He and Brennan corroborate each other in the statement as to the latter being employed to draft the will and see to its execution. Brennan testifies that he called at Mrs. Beyer's house on the Sunday preceding the 14th day of July, 1900, having first ascertained that a will made on Sunday would be valid; that he was conducted to Mrs. Beyer's room; found her in bed, and stated that he understood she desired him to draw up her will, to which she assented. He then proceeded to take her instructions. She told him she desired to leave the property to Louis Beyer, Jr., having confidence that he would carry out her wishes in regard thereto, which, in substance, was that he and his sister should live in the house with their adopted father and after his death divide the property between them. She explained that she would not leave it directly to her husband because she was afraid he would probably lose it in exploiting his inventions, of which he had a number, and had already lost a good deal of money on them. She gave the attorney the names of her relatives and bequeathed them small legacies, spelling out their names for him.

Brennen then drew up the will at once and called in from the next room Dr. Smith, the family physician, and also a Mr. Sullivan (who had been requested to come to the house for the purpose of witnessing the will), and having read it over to her, asked her if it was her will and if she requested the gentlemen present to witness it for her. She answered affirmatively, and then, having signed it, it was duly attested. Brennan took the will away with him for safe keeping, but on reading it over the next day he discovered that he had made a clerical error in leaving out the word "heirs" in the devise to young Beyer; accordingly on the same day (Monday), he called again on Mrs. Beyer, stating that owing to this mistake it was necessary to re-execute the will. He says that she then told him that as long as it had to be re-executed, she wished to include Mrs. Johnson by name as an equal taker with Louis Beyer, Jr. Brennan accordingly went back to his office, re-drafted the will, and on Tuesday returned, and it was then and there signed and attested by the same witnesses, except Mr. Sullivan, whose place was taken by a Dr. Atkinson. Brennan says that on both occasions Mrs. Beyer was perfectly sound in mind, very intelligent in expressing her wishes, and spoke in an ordinary tone of voice. He is corroborated in this by both Drs. Atkinson and Smith. Brennan took the will away with him and locked it up in his safe. Neither Mrs. Johnson nor young Beyer was in the room at the making of either of the wills. Indeed, on the day of the execution of the last will, young Beyer was down town at his office. Nor did either of them see the will until after Mrs. Beyer's death, nor did they know of its contents except as the son was told by Mrs. Beyer herself.

The husband, Louis Beyer, Sr., never even heard that the will had been made. He learned it only after his wife's death, and was quite displeased with the disposition of the property; believing that he, as head of the family, should control it. There appears to have been some feeling exhibited on his part to his adopted children on this account, the result of which was that the six houses and more than half the ground was

conveyed to him in fee by the two children. They continued to live together in the dwelling house, but in course of time an estrangement grew up and the appellant left the common home and remarried. Nearly three years after the death of Mrs. Beyer, Caroline LeFevre, one of her sisters who had been living all the time in the District, seemed to have suddenly awaked to the determination to file this bill and attempt to "break" the will, and this litigation is the consequence.

(2) The Evidence Upon the Issue of the Mental Capacity of Mrs. Beyer.

It was not disputed that the testatrix executed the will, but her mental capacity was attacked. Only two witnesses testified in behalf of the appellee upon the latter point, viz: Louise B. Stone, niece of the deceased and daughter of the appellee, and Fanny Perry, a colored servant girl in the family of the deceased and about eighteen years of age at the time of the death. Neither of these witnesses ventured to say in so many words that the deceased was not mentally qualified to make a will. They confined their testimony to statements tending to show that she was very sick—a fact not disputed. She was suffering from a malignant abdominal cancer, a disease, as her physician testified, not at all affecting the mentality of the patient until a few days of her death (R. 69). The will was drawn twelve days prior thereto. The evidence is overwhelming, indeed there is none to the contrary, that at the time of the execution of the will Mrs. Beyer was perfectly clear in mind. Such was the testimony of Dr. Smith, Dr. Atkinson, Dr. Selhausen (who saw her a day or two afterwards), Rev. Dr. Facius, her pastor, and her two adopted children; the jury also found that such was her mental condition, and that she knew and understood thoroughly the terms of the will which she herself dictated to the attorney who drew it.

(3) The Alleged Undue Influence.

Considering the ridiculous paucity of the evidence to support this issue, it is difficult to deal patiently with it. Besides

its utter denial by the accused parties, the detailed testimony for the appellant is overwhelmingly to the contrary.

It should be remembered that the issue of undue influence is always so involved and interwoven with the issue of testamentary capacity that proof of the strength and clearness of the testator's mental condition at the time of making the will affords a strong presumption of the absence of all coercive influence.

"While the issue of undue influence is quite distinct from that of testamentary capacity, the two are commonly found united and must be considered together."
27 Am. Ency. Law, 504;
Schouler on Wills, §§ 225–226.

"Some have thought that the exercise of undue influence necessarily presupposes weakness of mind in the testator, and certainly it matters not how ingenious the fraud or how coercive the influence, if there be intelligence enough to detect and strength enough to resist them."
Latham *vs.* Udell, 38 Mich., 238, 242;
Schouler on Wills, §§ 226, 242;
Shailer *vs.* Barnstead, 99 Mass., 112, 121.

"Without such proof [weakness of mind] the issue [undue influence] can seldom or never be maintained."
Ibid., 121.

The witness, Fanny Perry, who was a colored servant girl in the family of the deceased for about two or three years before her death, was the *only* witness offered to support the charge of undue influence. We challenge the learned counsel for the appellee to point to a single circumstance in the testimony of any other witness which can be held to be relevant to such a charge. The girl, Fanny, however, does make a weak attempt to relate, in an incoherent way, certain isolated occurrences which, even if true, would establish nothing, standing of themselves. There was not, however, a solitary witness offered to support, directly or indirectly, her testimony concerning a single one of these occurrences, while, on

the other hand, she was directly contradicted in most of these particulars by both Mrs. Johnson and Louis Beyer, Jr. It should be noted also that her testimony as to the ability of Mrs. Beyer to make known her wishes on the day the will was executed is in thorough conflict with the testimony of the family physician, Dr. Smith, and also of Dr. Atkinson and the attorney, Mr. Brennan, and Dr. Selhausen, who called to see the testatrix the next day, or the day after the will was drawn. The testimony of the Rev. Dr. Facius, the pastor of Mrs. Beyer's church, is also in conflict with her statement. All of these gentlemen say that, while Mrs. Beyer was sick at or about the time the will was executed, she was nevertheless quite able to converse in an ordinary tone of voice, and so clear was her enunciation that Dr. Smith, who testifies that he is very hard of hearing, could hear her distinctly (R., 72, fol. 137). In view of the testimony of these professional gentlemen, what must we say of the credit to be given this "willing witness," Fanny Perry, when she testifies about other matters? She is asked:

"Q. Just state to the gentlemen of the jury and his honor what her condition was on the day that these people came to see her [viz: the day the will was executed].

"A. The day the people came to see her she was very *weak* and she was unable to sit up or to help herself at all. [Note that Dr. Atkinson says she was propped up in bed. R., p. 64.]

"Q. Could she talk? A. She could talk, but not loud. *You had to hold your ear down to her mouth to hear what she had to say.*"

This is the reliable witness upon whose sole and unsupported testimony of isolated and trivial facts, this will is to be set aside as having been procured "by the fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them or by any other person."

What is the testimony of Fanny Perry upon which the appellee relies to establish undue influence? It occupies but very little space in the record. Its incoherency and inconsis-

tency are palpable on its face; but as it is the case, and the whole case, of the appellee, we beg leave to point out to the court how irreconcilable it is with all the rest of the testimony in this record. It begins on page 42:

"Q. Just tell us what occurred, in your own way, on this day that these people came to see her about two weeks before she died?

"A. The day the people came to see her *I was not there;* I had gone home to get ready to go to Sunday school, and Mrs. Johnson came to me to get me to help her to get supper." (R., 43, *f.* 80.)

Observe that she is speaking of Sunday, for she was getting ready to go to *Sunday school.* Now Sunday was the day Attorney Brennan, corroborated by Dr. Smith and Mrs. Johnson and Louis Beyer, Jr., came to the house to make the first will which was afterwards destroyed—a will that left nothing whatever to Mrs. Johnson, and, therefore, could not have been the result of any undue influence exercised by her. The testimony proceeds:

"Q. Mrs. Helen Johnson? A. Yes, sir; Mrs. Stone was there. I was going up into Mrs. Beyer's room, and I met Mr. Louis Beyer in the hall.

"Q. Which Mr. Beyer? A. The young man.

"Q. What was he doing? A. He was going to the room with a pen and ink. He did not allow me to go into the room." (R., 43, *f.* 80.)

Beyer, Jr., testifies (and he is corroborated by Brennan) that he did not enter the room after he left Brennan with Mrs. Beyer, but merely knocked on the door and handed Brennan the pen and ink (R., 80, *f.* 153). Continuing, she says:

"She [meaning, we suppose, Mrs. Johnson] said 'You [meaning, we suppose, Louis Beyer, Jr.] go down stairs, and after you get the wagon hitched up take Mrs. Stone round to the Christian Endeavor Encampment first and then take her home; if she knows what is going on here, she won't leave to night unless she gets a share in the profits.'" (R., 44.)

Now Mrs. Stone herself gives no word of testimony of being at the house at the time when this first will was drawn, and the witness Fanny says that on that day (Sunday) she was not there when "the people" were there; that she had gone home "to go to Sunday school." So that it is evident from her testimony, if it be true, that the will had been already drawn and "the people" had departed or were about to depart when she returned to the house. Why then should Mrs. Johnson tell young Beyer to get Mrs. Stone out of the way since the will *had already been drawn?* She says Mrs. Johnson said, "She [Mrs. Stone] won't leave here to-night unless, &c.," showing that the hour was late when this statement was made, if it ever was made.

"Unless she gets a share of the *profits.*" This is an unlikely expression, and is meaningless, unless it be indicative of invention on the part of the witness.

"Q. How many persons were there on that occasion? A. I do not know exactly the number. I did not *see any of the people* who were in the room, but I know *Mrs. Stone was there.*" (R., 44.)

She had just previously testified that "the day the people came to see her [Mrs. Beyer] I was not there." Now she says she was there, and while she did not see "any of the people" in the room she knows "*Mrs. Stone was there.*" But Mrs. Stone herself does not say that she was there, and had she been she surely would not have omitted to say so, nor would counsel for appellee have failed to bring out the fact. Moreover, Mr. Brennan, Dr. Smith, Helen Johnson and Louis Beyer, Jr., all say that Mrs. Stone was never in the room at any time while the will was being drawn and executed. The testimony proceeds:

"Q. Did you ever hear Mrs. Johnson and Mrs. Beyer talking about a will? A. Yes, sir.

"Q. What did Mrs. Johnson say to Mrs. Beyer, and what did Mrs. Beyer say to Mrs. Johnson?

"A. I have heard [when or where is not said,] Mrs. John-

son ask Mrs. Beyer to make a will, but Mrs. Beyer said she would not make a will; that everything would be left to Mr. Beyer just as it was, and for them to stay with Mr. Beyer and treat him right, and when he died he would do right by them." (R., 44, *f.* 81.)

Of course if every word of this was said it cannot be claimed to be evidence of undue influence, or circumvention, or fraud; and so of the next two questions and answers.

"Q. Did you ever hear any conversations between Mrs. Johnson and Mr. Louis Beyer, Jr., about getting Mrs. Beyer to make a will? A. Yes, sir.

"Q. What were those conversations?

"A. I heard Mrs. Johnson ask Mr. Louis to go and see about getting a will made when she got after Mrs. Beyer to make a will. She asked him to go and see what is to be done if she were to die and the will were not made. He went and I heard him tell her that Mr. Beyer, Sr., and her sisters could come in and take possession of everything. She said then that she would see that a will was made." (R. 44, *f.* 81.)

It was perfectly proper for an adopted daughter to request her mother to make a will; that is not undue influence in any sense. But observe the improbability of the story that Louis Beyer, Jr., went off to find out what would happen if a will were not made, and came back and said *Mr. Beyer, Sr.* (who would have been pauperized if no will were made), would come in *with Mrs. Beyer's sisters* and take everything.

The witness' testimony in chief (so far as it in anyway can be said to relate to the subject of undue influence), then closes with the following:

"Q. Did you hear any conversations after she (Mrs. Beyer), came back from Richmond?

"A. I heard Mrs. Johnson, after Mrs. Beyer was in bed, ask her to make a will. She said she would not make a will, but would leave it to Mr. Beyer [a statement made, if at all, under the impression that he would inherit it]. Mrs. Johnson said, "Yes, you will leave it to him, and he will sink it in a boat or rum mill."

"Mrs. Beyer said, 'Nellie, how can you talk about your Uncle like that?' Mrs. Johnson was after her to make a will and she said she would not make it, and she said, 'Nellie, you are harassing me to death.' Mrs. Johnson said she would go if the will were not made; Mrs. Beyer said, 'You have run Mrs. Stone out of the house to get something when I die. You said she was waiting for a dead man's shoes, but you are the one to catch it.'" (R., 44 *f*, 82.)

Now, upon the existence in the record of these incoherent ejaculations, the court is asked to say that Mrs. Beyer would not have made this will which preserved a home for her husband and adopted children, but would have left them to be turned into the street by her collateral relations. The appellee would have us believe that the wife and mother could have been guilty of this unnatural act, although the record discloses not a single reason why she should have left her property to collaterals instead of those who were nearest and dearest to her.

The witness does not remember when these alleged conversations were had, except that she *thinks*, but does not know, that it was the winter before Mrs. Beyer died. She died July 26; so that, putting it at that indefinite time, it would be anywhere from six to nine months before her death.

"Q. When was the first time you heard any conversations? A. It was during the winter. *I do not know* what time it was, but I know it was in the winter.

"Q. The winter before she died? A. *I do not know whether it was the winter before she died.* I do not *know* what time it was; but I know it was in the winter.

"Q. The winter before she died? A. *I do not know whether it was the winter before she died.* I heard them talk about it. I do not know what day it was, *or the year.*

"Q. But it was in the winter? A. Yes, sir.

"Q. The winter before Mrs. Beyer died? A. Yes, sir, I *think* it was in the winter before she died, yes, sir, I *think* it was. (R., 48.)

This was the only attempt to fix any time for these conversations. They are explicitly denied by Mrs. Johnson; but

even if they were not, it certainly cannot be said that their effect is to establish that Mary Beyer's will, made at least eight or nine months, if not years, afterwards, was "procured by fraud, circumvention, or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person."

If then this evidence is insufficient under the well-settled rule which requires "clear, explicit and strong" evidence to establish a fraud, what other evidence is there? On the other hand, the testimony of the family physician, of the family pastor, of the lawyer who drew the will, of Dr. Atkinson who witnessed it, of the adopted children, and, more than all, of the provisions of the will itself, make it overwhelmingly clear that the will was the result of Mrs. Beyer's own proper wishes communicated to her attorney on three separate occasions with no one present to influence her, and after she had made and caused to be destroyed at least one will, because, in regard to its failure to provide directly for Mrs. Johnson instead of in trust, she had changed her mind. We submit that if ever the entire absence of undue influence, at the time of the making of a will, was established, it had been established in this case.

But even if we had offered no evidence whatever to sustain the proposition that the will was the free act of Mrs. Beyer, it does not follow that, standing alone, as it does, the incoherent jumble of isolated facts testified to by this unlettered servant girl is sufficient to overthrow the legal presumption of the validity of a will made by a person of conceded mental capacity to make it:

"In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis, and the same holds true where positive fraud or force is the ground of objection. Hence, it is that isolated and disconnected circumstances are not permitted to outweigh the usual presump-

tion of the law that a person of intelligence and capacity who executes a will does so without imposition or undue influence."

Schouler on Wills, Sec. 239, citing Boyse *vs.* Rossborough, 6 H. L. Cas., 6;
Most *vs.* McGlynn, 88 N. Y., 357;
Fritts *vs.* Deuemberger, 12 N. J. Eq., 129.

Again, not even Fanny Perry undertakes to say that Louis Beyer, Jr., or his adopted father, ever said or did a single thing which can be characterized as undue influence; and yet to set aside this will would be to deprive them of the legitimate benefaction of the mother and wife, and especially to throw the aged husband upon the charity of the world. Would Mary Beyer, could she speak from her grave, declare that she was unduly influenced to make this provision for them? It is unnatural to suppose that she would say so.

The provisions of the will are just and natural.

It is just such a will as many persons under the circumstances would have made, viz: leaving the property to the children with directions amounting to a trust to permit the husband and father to use it as his home during his lifetime. Other wives, it would be said, might have left the property directly to the husband. But it is certain that not one person in fifty, under the circumstances of this case, would have left any portion of it to the appellee, who was married and had contributed nothing to the testatrix's life; whereas the defendants, the beneficiaries of her bounty, are her husband and adopted children.

"If the provisions of a will are just, natural, and reasonable, these facts will do much to show that it was the proper will of the testator."

27 Ency. Law, 502.

"The harmony of the will with the testator's habitual disposition and affection is worthy of much consideration."

Allen *vs.* Public Adm'r, 1 Bradf. (N. Y.), 378.

(4) The Findings of the Jury Are the Result of the Law Judge's Instructions Upon a Supposititous State of Facts, and of Duress to Bring About a Finding Thereon.

The record supports us in this statement. Some of the jurors, as we learn from the statement to the court by the foreman (R., 111–112), seem to have been under the impression, without a particle of evidence to sustain it, that Louis Beyer, Jr., had exercised undue influence over Mary Beyer. There was almost at the very outset a disagreement in the jury room in regard to this. Thus the record discloses the following:

"The jury retired, and, after an hour spent in deliberation, returned to the court room for further instructions.

"The CLERK: Gentlemen of the jury, have you agreed upon a verdict?

"The FOREMAN: No, your Honor, a controversy has arisen among the jurymen as to the effect of the instructions of the court relative to undue influence. We ask that you give us further instructions upon that point. In order that you may understand the difficulty that we labor under, I will say that some of the jurymen have the impression that the *importunities of Louis Beyer, Jr.*, [there was not a scintilla of evidence of any such importunities], and Mrs. Helen Johnson, if made either affectionately or by persistence are undue influence, and on that point we are at outs, and we desire to have further information from you upon that point.

"The COURT: If the will was brought about by the influence of affection of Mrs. Beyer for her nephew and niece—if she made the will in their favor because of her affection for them, although they may have persistently cultivated her affection that would not be undue influence." (R., 112, *f.* 215.)

There was no testimony as to whether they persistently cultivated the affection of their aunt or not. The record contains nothing whatever bearing upon the subject, other than the fact that Mrs. Beyer had adopted them as her children; the statement of the court, therefore, was not called for; there is nothing, however, for us to complain of in that. But the court goes on and, to our serious undoing, instructs the jury

upon a purely *imaginary* state of affairs as if there were some evidence in the case to support it; thus:

"But if the will was brought about by their [which includes Louis Beyer, Jr.] *persistent importunities* upon her to make a will in their favor; if they were so continuous and earnest and annoying that she, *in her condition*, [What condition? Is there any testimony that she was feeble in mind? The very contrary is the case, and the jury so found.] yielded to them and made a will as they desired, *in order to get rid of their importunities*, a will different from what she wanted to make, then it was undue influence. (R., 112.)

We earnestly submit that the testimony in this case cannot by the wildest imagining be twisted or tortured into the semblance of any such state of facts. Certainly the testimony of Fanny Perry as to Mrs. Johnson, the niece, does not support it, and nobody breathes a word about the husband or the nephew having said or done anything that can be claimed to even tend to show "persistent importunity" or "annoying importunity," and yet the jury are sent out of the court by the judge to brood over such an imaginary case.

(5) The Duress and Coercion of the Jury to Render a Verdict.

But that is not all. After deliberating several hours over this supposititious state of affairs, the jury come again into the court room, whereupon the record (112) discloses the following colloquy:

"The CLERK: Gentlemen of the jury, have you agreed upon a verdict?

"The FOREMAN: No, your Honor; after *a very deliberate consideration* of the subject referred to us by these interrogatories, I find the jury divided—hopelessly so.

"The COURT: Not so now. Some twelve men are to decide this case. I do not believe we could get twelve better men in the District of Columbia to decide it than you are.

"The FOREMAN: If you will permit me to say, that is the difficulty; we have apparently twelve intelligent and self-willed men.

"The COURT: Yes; do not yield your conscientious convictions; but there is a right and a wrong—I mean the evidence proves one or the other. See what the fact is and decide it."

It was Friday afternoon; and, as the court was about to adjourn, the jury are told to render a sealed verdict. Then the court proceeds to say:

"Then put it in an envelope, let the foreman take it and keep it until Monday morning at 10 o'clock and then bring it into court. You will remain in your room *and not separate until you have decided the case*, written the answers to the interrogatories and signed your name on the paper. *So soon as you shall have done that*, then you will be *at liberty* to separate and go to your homes.

"The FOREMAN: Your Honor, I am sure you will keep us here until Monday morning.

"The COURT: I am quite satisfied you will be out of there by bed time. * * * We will not trouble you to come back here Saturday morning.

"The FOREMAN: We are not to leave the room until after we have reached a conclusion?

"The COURT: *You are not to separate* except that one of you may want to go out [*i. e.*, to answer the calls of nature]. If any of you want a lunch, let the messenger know, and he will send out and get it."

The incident then closes with these words:

"The jury retired; and, the court having adjourned, a sealed verdict was handed in Monday morning."

Here, then, was a jury which after hours of "deliberate consideration" comes into the court and tells the judge that they are "hopelessly divided." The judge, notwithstanding, sends them back to their room, telling them to "see what the fact is and decide it," adding these important and, to the jury, *ominous* words: "You will remain in your room *and not separate until* you have *decided* the case." Nor did the court neglect to hold out the pleasant inducement that "so soon as you shall have done that (*i. e.*, decided the case) you will be at *liberty*." With the fear that they will be kept there "until

Monday morning" the jury go back to their room. The record does not show whether they agreed "by bed time" or not; but they secured their "liberty" by agreeing, and the sealed verdict was brought in on Monday morning. We submit with confidence that it is impossible to say that this verdict was not the result of coersively surrendered convictions. It was a verdict rendered, as we have seen, by a "hopelessly divided" jury, under pressure of having to remain in the jury room over Sunday, "and not to separate until you shall have decided the case." Such a verdict demands a close and critical examination of the evidence by the Chancellor before he is entitled to say he "cannot certainly entertain a doubt" (R., 141) that the verdict is what it should have been.

(6) The Jury Trial a Nullity.

An examination of the evidence by this court is, we believe, all that will be required in order to secure the rejection of the jury's findings; but, if it be necessary to go further, then we insist that the trial was a nullity because of these instructions by the trial judge to the jury after they had informed him, through the foreman, that they were "hopelessly divided." The authorities fully sustain us in this contention. In Pierce *vs.* Pierce, 38 Mich., 412, the court said:

"Every attempt to drive men [a jury] into an agreement which they would not have reached freely is a perversion of justice."

In Green *vs.* Telfair, 11 How. Prac. (N. Y.), 260, the court, after expressing its views as to the length a judge may go in the endeavor to get the jury to agree, added:

"Any attempt to influence the jury by referring to the time they are to be kept together, or the inconveniences to which they are to be subjected in case they are so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. *I think he has no right even to allude to his own purposes as to the length of time they are to be kept together.* There should be

nothing, in intercourse with the jury, having the least appearance of duress or coercion."

There was a reversal on this ground.

In Slater *vs.* Mead, 53 How. Prac. (N. Y.), 57, the jury, after being out a long time, reported that they could not agree. After further instructions, the court said *inter alia:*

"You must agree upon a verdict. I cannot discharge you until you agree upon a verdict."

The jury retired and soon after agreed. The appellate court set the verdict aside as induced by constraint.

In 16 American and English Encyclopedia of Law, 522, the rule is said to be that:

"Language on the part of the court, the obvious tendency of which is to coerce an agreement on the part of the jury, affords ground for a new trial. *To insist too strenuously upon the necessity of an agreement may have such effect.*"

In Randolph *vs.* Lampkin, 90 Ky., 551, some of the language of the trial judge was:

"Gentlemen, how do you expect this case to be decided unless you do it? You must decide it."

The Supreme Court of Kentucky said:

"It does not appear, nor is it contended, that the judge of the court intentionally abused the discretion he had, and might necessarily exercise, as to the length of time the jury ought to have been kept together with a view to agreement upon a verdict. But it seems to us, when the fact that the jury had come into court, *and announced it impossible for them to agree*, and the length, tone, and manner of the address by the court are considered, the conclusion is almost inevitable that the jury brought in a verdict which they would not have rendered but for the interposition of the court. And as the actual finding *shows some evidence of a compromise of opinion*, and yielding by some of the jury of their previously announced *unalterable* conviction, we think the verdict cannot be regarded as the result of deliberate judgement."

It is true that the trial judge in the case at bar, in answer to the foreman's statement that there were "twelve intelligent, self-willed men" on the jury, said "Yes; do not yield your honest convictions." But this was a single, brief sentence preceded and followed by so many that were highly objectionable that its effect, as the result proved, was completely lost amid all this obnoxious language. In State *vs.* Bybee, 17 Kans., 462, the trial judge used even a stronger disclaimer of attempting to coerce the jury, saying: "It is not my purpose to force you to a verdict not in accordance to your convictions," but at the same time he dwelt with considerable length and in very forcible language upon the importance of coming to an agreement. On a writ of error to the Supreme Court of Kansas a new trial was granted on this account, notwithstanding the disclaimer. Mr. Justice Brewer, delivering the opinion of the court, said:

"It may not perhaps be possible to single out any particular sentence, and say that this is, strictly speaking and taken by itself, erroneous, and sufficient to justify a reversal, though there are some that seem to tresspass a good deal on the right and duty of each juror to the free exercise of his individual judgment. Yet the general impression of these instructions, as we read them, and as it seems to us, must have been received by the jury, is that the jury ought, by *compromise, and surrender of individual convictions if necessary*, to come to an agreement and that a failure to so would be an imputation upon both jury and court."

Another expression of the trial judge on the occasion referred to in the case at bar, was:

"You are not to seperate. * * * If any of you want a lunch, let the messenger know and he will send out and get it." (R., 113.)

There is no law, or rule of court or appropriation made in the District of Columbia which provides for the furnishing of meals to jurors in civil cases when they are confined in the jury room considering of their verdict. No matter how long they are confined, if a juror needs food he must obtain it at

his own expense. The action of the judge, therefore, in stating to a jury late Friday afternoon, just as the Court was about to adjourn, and after they had just declared to him that they had deliberately considered the case and were hopelessly divided, "You will remain in your room and not separate until you have decided the case," and then adding this remark as to getting food was equivalent to saying, "If you need food you must get it at your own expense." Apropos to a similar situation is the case of Physioc *vs.* Shea, 75 Ga., 466, where the jury, having been out all night, came into court and stated that they could not agree. The judge refused to discharge them and sent them back to their room, telling them (as did the judge in this case,) that they should be made as comfortable as possible, "*but they must get their meals at their own expense.*" It was held by the Supreme Court of the State that this language operated as a threat *to starve such as had no money* into finding a verdict.

Again, the statement made to the jury that "there is a right and a wrong—I mean the evidence proves one or the other. See what the fact is and decide it," did not submit the case properly to the jury. It ignored and eliminated entirely from the case the consideration (a,) of the amount of proof necessary to establish undue influence, and (b,) that the defendants were not bound to prove anything. The issue was: "Are the defendants, or any of them, guilty of exercising fraud, circumvention or undue influence upon Mary Beyer to procure this will?" To this the Court said, referring to the evidence: "There is a right and a wrong [*i. e.*, guilt or innocence,] the evidence proves *one or the other.*" Yet it was not necessary that the evidence should *prove* innocence, and the jury might not have thought that it did. Now if the jury had thought, as they might have done, that the *negative* of the issue had not been satisfactorily proved by the defendants it did not follow because there may have been *some* testimony offered by the plaintiff tending to prove the affirmative, therefore, the charge of fraud, circumvention or undue influence was sufficiently proved. Yet the court so gave the jury to understand—"the evidence proves [establishes] one or the other."

The instruction, in other words, placed upon the defendant the burden of proving innocence—of proving a negative. In Cranston *vs.* N. Y. & H. R. R. R., 103 N. Y., 614, which was a suit to recover damages for injuries received, a verdict for the plaintiff was set aside because of the use by the trial judge of similar language to a jury which had difficulty in agreeing.

Rapallo J., after stating that on the uncontroverted evidence it was a serious question whether the plaintiff was entitled to recover, said:

"But we need not discuss that question, as the case contains an exception which we are *all* agreed is well taken, and requires a reversal of the judgment and a new trial. After the jury had retired to consider their verdict, they came into court, and one of them stated that there was *no probability of their agreeing.* To this the court replied as follows: 'I can't take any such statement as that, gentlemen; you must get together upon a matter of this kind.' He then added, 'no juror ought to remain entirely firm in his own conviction one way or another until he has made up his mind, beyond all question, *that he is necessarily right and the others are necessarily wrong.*' To this statement the defendant's counsel excepted. The jury thereupon brought in a verdict for the plaintiff. We are of the opinion that the instruction excepted to was not a correct statement of the law. It was incumbent upon the party holding the affirmative of the issue, who in this case was the plaintiff, to satisfy the jury, by a preponderance of evidence, of the facts upon which her right to recover depended. If she failed to do so the defendant was entitled to a verdict. The jurors who were not satisfied by the evidence, of the truth of the plaintiff's allegations, were justified in refusing, for that reason, to find a verdict in her favor, although they might not have made up their minds beyond all question *that they were necessarily right*, and that those who were in favor of finding a verdict for the plaintiff *were necessarily wrong.* To sustain this instruction would be to cast upon the defendant, in a civil action, a burden quite as heavy as that which rests upon the prosecution in a criminal case, and perhaps still more onerous."

Of course, in all that we have said as to the force and effect of the remarks of the trial judge, we have not intended the

slightest reflection upon his purpose to be entirely fair in his conduct of the case. We accept and adopt, and wish to apply to him in all its fullness, what was said by Mr. Justice Brewer in the Kansas case heretofore cited—State *vs.* Bybee, *supra:*

"All of the present members of the court have had experience as district judges, and know what is their solicitude for the agreement of juries, and their repugnance to see the labors of a trial prove abortive through the failure of the jury to agree. We therefore fully appreciate the considerations which induced these instructions from the learned judge, and fully sympathize with the spirit which controlled him, but are nevertheless constrained to believe that he passed beyond the line which should limit the counsels and instructions of a court to a jury, and that thereby the material rights of the defendant were prejudiced."

The finding of the jury was not, therefore, the true judgment (*veredictum*) of twelve *satisfied* jurors. We use this word because both the Chancellor below and the Court of Appeals have used it more than once. "The jury were satisfied," they say. On the contrary, we submit that the entire colloquy between the court and the jury shows that their subsequent verdict was the result of the surrendered convictions of some of these intelligent but "self-willed men," coerced into doing so under fear of imprisonment, if we may so express it, from Friday afternoon until Monday morning, with the inducement before them, as suggested by the trial judge, that they could obtain their *immediate liberty* by "deciding the case." Under these circumstances, the "hopelessly divided" jury came to an agreement, and obtained immediately their promised liberty. It was not, therefore, the united and unanimous conviction of "twelve men, good and true," and consequently these findings stand upon the record as a nullity.

Respectfully submitted,

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For the Appellant.